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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Consider
Regulating Telecommunications Services Used
by Incarcerated People.

R.20-10-002
(October 8, 2020)

OPENING BRIEF OF

**CALAVERAS TELEPHONE COMPANY (U 1004 C)
CAL-ORE TELEPHONE CO. (U 1006 C)
DUCOR TELEPHONE COMPANY (U 1007 C)
FORESTHILL TELEPHONE CO. (U 1009 C)
HAPPY VALLEY TELEPHONE COMPANY (U 1010 C)
HORNITOS TELEPHONE COMPANY (U 1011 C)
KERMAN TELEPHONE CO. (U 1012 C)
PINNACLES TELEPHONE CO. (U 1013 C)
THE PONDEROSA TELEPHONE CO. (U 1014 C)
SIERRA TELEPHONE COMPANY, INC. (U 1016 C)
THE SISKIYOU TELEPHONE COMPANY (U 1017 C)
VOLCANO TELEPHONE COMPANY (U 1019 C) AND
WINTERHAVEN TELEPHONE COMPANY (U 1021 C)
("SMALL LECS")**

Sarah J. Banola
Patrick M. Rosvall
Sean P. Beatty
BRB Law LLP
436 14th Street, Suite 1205
Oakland, California 94612
Telephone: (973) 903-0189
Email: sarah@brblawgroup.com

Attorneys for the Small LECs

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Pursuant to Ordering Paragraph 1 of the Assigned Commissioner’s Phase II Scoping Memo (“Scoping Memo”), Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Co. (U 1009 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Co. (U 1012 C), Pinnacles Telephone Co. (U 1013 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Volcano Telephone Company (U 1019 C), and Winterhaven Telephone Company (U 1021 C) (the “Small LECs”) submit this opening brief in response to the jurisdictional questions raised in Appendix 1 to the Scoping Memo. The Small LECs do not provide intrastate communications services in California to incarcerated people, so the questions about prices, terms, and conditions of those services are not relevant to the Small LECs. However, the Small LECs briefly respond to the important jurisdictional questions raised in Appendix A.

Specifically, Appendix A raises the following two questions:

1. Does the Commission have authority to regulate rates, fees and/or service quality of video and related services provided to incarcerated persons in California, including remote video calling services, inperson video calling services, text (SMS) services, private messaging services, tablet services, photo sharing/music, video entertainment and/or internet access services (hereafter “video and related services”)?

2. If yes, should the Commission adopt interim or permanent rate caps and/or ancillary fee regulations for video and related services?

Regardless of their functionalities, the services described in question 1 all appear to be Internet access services over which the Commission lacks authority and jurisdiction. Internet access service is an information service subject to the Federal Communication Commission’s (“FCC”) authority, which places it beyond the Commission’s regulatory purview.¹ As the FCC has found, “it is well-settled that Internet access is a jurisdictionally interstate service because a

¹ See *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, *Declaratory Ruling, Report and Order*, FCC 17-166 (rel. Jan. 4, 2018) (“*RIFO*”) at ¶ 20 (“[w]e reinstate the information service classification of broadband Internet access service.”), *petition for review granted in part on other grounds and denied in part by Mozilla Corp. v. Fed. Commc’ns Comm’n*, 940 F.3d 1, 35 (D.C. Cir. 2019) (upholding the FCC’s classification of broadband Internet access as an “information service”); see also Pub. Util. Code § 202 (prohibiting Commission jurisdiction over “interstate commerce”).

1 substantial portion of Internet traffic involves accessing interstate or foreign websites.”² Based on
2 those interstate characteristics, the classification of broadband service is within the FCC’s
3 authority, not the Commission’s jurisdiction.³

4 Information services are subject to a deregulatory framework in which “public-utility
5 style” or “common carrier” regulations are not permitted.⁴ The imposition of rate or service
6 quality regulations on unregulated, interstate broadband services would result in federal
7 preemption.⁵ The imposition of rate or service quality regulations on unregulated, interstate
8 information services would also harm consumers by stifling innovation and investment in these
9 services in contradiction of the FCC’s recent findings.⁶ This proceeding must remain focused on
10 the services that the Commission lawfully regulates.

11 The “voice services” referenced in Question 1 likewise appear to relate to unregulated,
12 over-the-top (“OTP”) applications like Zoom, Skype or Microsoft Teams. OTP VoIP services are

13 ² *RIFO* at ¶ 199; *United States v. Costanzo*, 956 F.3d 1088, 1092 (9th Cir. 2020) (internal quotation marks
14 and citation omitted).

15 ³ 47 U.S.C. § 152(a); Pub. Util. Code §§ 216, 233, 234; Cal. Const., art. XII, §§ 3 (defining public utilities
16 that are “subject to control by the Legislature”), 6 (the CPUC “may fix rates establish rules, examine
17 records, . . . for all *public utilities* subject to its jurisdiction.”) (emphasis added); *see also City & Cty. of San*
18 *Francisco v. W. Air Lines, Inc.*, 204 Cal.App.2d 105, 131 (1962) (“Unless the enterprise or activity in
question is a public utility as defined in the Constitution or Public Utilities Code, it is not subject to the
jurisdiction of such commission.”), *citing Television Transmission v. Pub. Util. Comm’n.*, 47 Cal.2d 82, 84
(1956).

19 ⁴ *RIFO* at ¶ 87 (“[W]e conclude that economic theory, empirical studies, and observational evidence
20 support reclassification of broadband Internet access service as an information service rather than the
application of public-utility style regulation on ISPs. We find the Title II classification likely has resulted,
and will result, in considerable social cost, in terms of foregone investment and innovation.”).

21 ⁵ *See, e.g., Telecommunications Ass’n v. Brand X Internet Servs.* (“Brand X”), 545 U.S. 967, 975 (2005)
22 (“The [Telecommunications] Act regulates telecommunications carriers, but not information-service
23 providers, as common carriers.”); *Fischer v. Time Warner Cable Inc.* (2015) 234 Cal. App. 4th 784, 791 (“a
federal agency’s regulations will preempt any state or local laws that conflict with or frustrate the
regulations’ purpose.”); *Charter Advanced Servs.*, *supra*, 903 F.3d 715, 718 (“any state regulation of an
information service,” such as broadband services, “conflicts with the federal policy of nonregulation” and
is preempted); *see also Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 873-874; *N.Y. State*
24 *Telecomms. Ass’n v. James*, 2021 U.S. Dist. LEXIS 110127, *22-23 (explaining that “rate regulation is a
25 long-accepted method of regulating common carriers” and finding that New York’s Affordable Broadband
Act “conflicts with the implied preemptive effect of both the FCC’s 2018 Order [*RIFO*] and the
Communications Act.”).

26 ⁶ *RIFO* at ¶ 1 (finding that “burdensome regulation . . . stifles innovation and deters investment.”); *see also*
27 *N.Y. State Telecomms. Ass’n*, *supra*, 2021 U.S. Dist. LEXIS at *22-23 (finding “common carrier obligations
28 directly contravene[] the FCC’s determination that broadband internet ‘investment,’ ‘innovation,’ and
‘availab[ility]’ best obtains in a regulatory environment free of threat of common-carrier treatment,
including its attendant rate regulation.”).

1 unregulated and treated as an information service under federal law, so the Commission does not
2 have jurisdiction to regulate the rates, fees and/or service quality of these services.⁷ To the extent
3 this question concerns interconnected VoIP services, these are interstate services, not subject to
4 traditional common carrier regulatory requirements under federal law.⁸

5 Because the Commission lacks jurisdiction over the information services noted in Question
6 1, it may not lawfully adopt rate caps or ancillary fee regulations on these services.

7 Executed at Belmont, California on this 28th day of January 2022.

8 Sarah J. Banola
9 Patrick M. Rosvall
10 Sean P. Beatty
11 BRB Law LLP
12 436 14th Street, Suite 1205
13 Oakland, California 94612
14 Telephone: (973) 903-0189
15 Email: sarah@brblawgroup.com

16 By: /s/ Sarah J. Banola
17 Sarah J. Banola

18 Attorneys for the Small LECs

19 ⁷ 47 U.S.C. § 153(24); *In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World*
20 *Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket 03-45,
21 *Memorandum Opinion and Order*, FCC 04-27 (rel. Feb. 19, 2004) at ¶ 16 (finding computer-to-computer
22 VoIP is an information service and noting that "federal authority has already been recognized as
23 preeminent in the area of information services, and particularly in the area of the Internet and other
24 interactive computer services, which Congress has explicitly stated should remain free of regulation.");
25 *Vonage Holdings Corp. v. Minn. PUC*, 290 F.Supp.2d 993, 1000 (Dist. Minn. 2003) (holding that
26 computer-to-phone VoIP is an "information service" rather than a "telecommunications service")
27 ⁸ See, e.g., *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning and Order of the*
28 *Minnesota Public Utilities Commission*, WC Docket No. 03-211, *Memorandum Opinion and Order*, FCC
04-267 (rel. Nov. 12, 2004) ¶ 1 & n. 78 (confirming that interconnected VoIP is not subject to traditional
telephone company regulations); *Minnesota PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007) (affirming Vonage
order); see also *Charter Advanced Services, LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018), *cert. denied*
(2019) 140 S. Ct. 6 ("[i]n the absence of direct guidance from the FCC," interconnected VoIP service
should be treated as an "information service."). The Small LECs are aware that the Commission recently
concluded in the disaster relief proceeding that VoIP providers are "telephone corporations," and that the
Commission had authority to impose certain emergency consumer protections on VoIP providers. D.19-
08-025, COL 17, 20); see also D.20-09-012 (denying rehearing applications). However, California courts
have not yet addressed this issue and the Small LECs disagree with the Commission's conclusion that VoIP
providers are "telephone corporations." VoIP is not a service provided over a "telephone line," and instead
requires a "broadband connection." Pub. Util. Code §239 (defining VoIP or "IP enabled" services);
Compare Pub. Util. Code §233 (separately defining "telephone line").